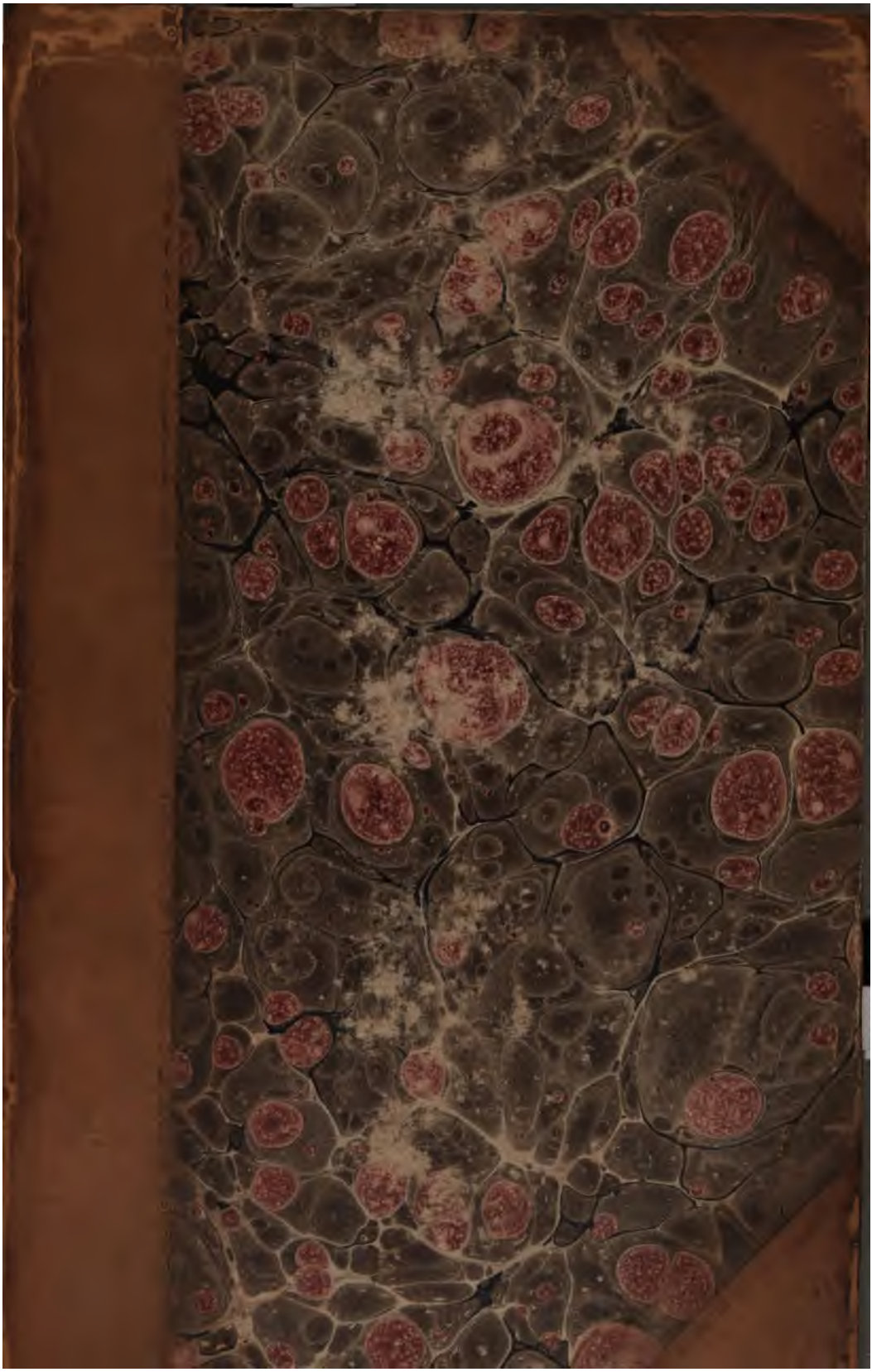

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THE

PRACTICE ON APPEALS

FROM THE COLONIES

TO THE

PRIVY COUNCIL;

WITH

SOME ACCOUNT OF THE JURISDICTION OF THAT HIGH COURT.

By JOHN PALMER, Gent.

Author of the Practice of Appeals in Parliament, &c.

TO WHICH IS ADDED,

THE JUDGMENT OF LORD CHANCELLOR LYNDHURST

IN THE CAUSE *FREEMAN* AGAINST *FAIRLIE*,

RESPECTING LANDED PROPERTY IN BENGAL.

LONDON:

SAUNDERS & BENNING, LAW BOOKSELLERS,

(*Successors to Joseph Butterworth & Son,*)

43, FLEET STREET.

1831.

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PRACTICE ON APPEALS

TO

THE KING IN COUNCIL.

IN a Treatise, lately published, on the Practice of Appeals and Writs of Error to the House of Lords, it is observed that Appeals from the Courts of the *Isle of Man*, *Jersey*, *Guernsey*, *Sark*, and *Alderney*, from those in our possessions in the East and West Indies, and other Colonial Courts, &c., lie to the King in Council, more generally termed the Privy Council.—See Introd. p. ii, Pract. p. 3. There not being, to the Editor's knowledge, any practical work on this subject, it has been thought expedient to exhibit, in a supplementary one, the course of proceeding on Appeals from the Colonies and Plantations. The term *Appeal* is used whether the Decision complained of, be that of a Court of Law or a Court of Equity; whereas in the House of Lords, Judgments of the Law Courts are reviewed by Writ of Error, while Decrees and Orders of Courts of Equity are brought before the House by Petition of Appeal.

OF THE JURISDICTION OF THE PRIVY COUNCIL.

Lord Chief Justice Hale says, that the Privy Council was originally known as the *Consilium privatum et assiduum.* See Pract. of Appeals, p. xii.—According to Lord Chief Justice Coke and Sir W. Blackstone, the Privy Council (now by way of eminence called *the Council*) is a noble, honourable, and reverend Assembly of the King and those he wills to be of his Council; the number of which in ancient time was about twelve. It afterwards greatly increased, and in 1679 was limited to thirty, of whom fifteen were the principal Officers of State, and the other fifteen were composed of ten Lords and

five Commoners; but the number has since been augmented, and is now indefinite; though only those attend who are summoned for the occasion. At their head is the Lord President of the Council, who, as his title indicates, presides at the Council Board. He is an ancient Officer, and in rank, has the precedence next after the Lord Chancellor and Lord Treasurer. The Privy Council are made by the Royal nomination, without Patent or Grant, except the Lord President, and are removable at his Majesty's discretion; they are sworn to secrecy in all matters that concern the state, and by the Act of Settlement, 12 and 13 W. 3. c. 2. no person born out of the Dominions of the Crown of England, unless of English Parents, even though naturalized, can be of the Privy Council, 1 Bl. Com. 229. 230.

Lord Hale mentions, that the Privy Council anciently formed part of the *Consilium Regis*, which Body exercised original Jurisdiction.—Pract. Appeals, p. xiv. And it also appears that the Privy Council did not only jointly, but separately, exercise Jurisdiction; for the Act of 17 Rich. 2, c. 6. complains of persons having been brought before the King's Council, and the Chancery, upon untrue suggestions. This is further evinced by the Statute of 16 Ch. 1. c. 10. founded on the Petition of Right, which declares that neither his Majesty, nor his Privy Council have, or ought to have, any Jurisdiction to determine, or draw into question, the Lands or Goods of the subjects of this Kingdom. By the same Statute the Court of Star Chamber, and the Court of Requests, both of which consisted of Privy Councillors, were dissolved. The Jurisdiction meant by that Act must of course have been original, and not appellate Jurisdiction. When this Act passed (1641) many of our present Colonies were not in our possession.

The Privy Council, says Sir W. Blackstone, has power to enquire into all Offences against the Government, and to commit offenders for Trial in the Courts of Law, their Jurisdiction being to enquire and not to punish; and persons committed by them are, by the 16 C. 1. c. 10. entitled to their writ of *Habeas Corpus*.

Though the Privy Council cannot now take original Cogni-

zance of matters of property, when the question arises in this country, yet in Plantation or Admiralty Causes arising out of the Jurisdiction of this Kingdom, and in matters of Lunacy and Idiocy arising in England, being a special Flower of the Prerogative, the Privy Council have cognizance as a Court of Appeal, or rather the Appeal lies to the King himself in Council. Also when disputes arise between two provinces abroad, as concerning the extent of their Charters, or the like, the King in Council exercises *original* Jurisdiction, on the principles of feodal sovereignty; and from all Dominions of the Crown, excepting Great Britain and Ireland, an Appellate Jurisdiction in the last resort, is vested in the same Tribunal, which is usually exercised in a Committee* of that Body, who make their Report to the King in Council, by whom the Judgment is finally given.—1 Bl. Com. 231.

This Body also hear Complaints made to His Majesty against Governors of Colonies, and against Judges in our foreign possessions, as well as other public Officers holding situations at the pleasure of the Crown; and if the Privy Council see sufficient ground, they may advise the removal of such persons; but they have no power to make reparation to injured parties, by giving damages, or to award punishment beyond that of dismissal. For such purposes recourse must be had to the Courts of Law.—See the Case of *Fabrigas* and *Governor Mostyn.*—Cowp. Rep. 175. The following Case also establishes two important points, viz. that the Privy Council will take cognizance of the decision of a Court Martial held abroad, and rescind it; and that the person aggrieved may maintain an action and recover damages against the members of a Naval Court Martial, for wrongful imprisonment. It is likewise remarkable, as well as interesting, from the other circumstances connected with it.

A Lieutenant of Marines, named Fry, had been charged, while in the West Indies, with contempt of orders, and tried by a Court Martial at Jamaica, who sentenced him to 15 years imprisonment, and declared him incapable of again serving the King, after his having been previously kept 14 months in severe

* Termed the Lords of the Committee of Council, for hearing Appeals from the Plantations, &c.

confinement. He was brought home, and his case being laid before the Privy Council, he was released. He brought an Action against Sir Chaloner Ogle, the President of the Court Martial, and had a verdict for £1000 damages; the Judge who tried the Cause, declaring that Actions would lie against every member of the Court Martial. Admiral Mayne and Captain Rentone, two others of the members, were then in England, and happened to be sitting on a Court Martial at Deptford, of which Admiral Mayne was the President; and Lieutenant Frye obtained an Order from Sir John Willes, the Chief Justice of the Common Pleas, to hold them to Bail; upon which, at the conclusion of the last mentioned Court Martial, they were arrested. This was highly resented, as a great insult, by the other members of that body, who held meetings on the subject, and came to certain *Resolutions*, in which they demanded "Satisfaction for the high insult on their President, from all persons, how high soever in office, who have set on foot this arrest, or in any degree advised or promoted it;" adding that by it the order, discipline, and government of his Majesty's armies by sea and land were dissolved, and the Stat. of 13 Chas. II. made null and void.

These Resolutions the Judge Advocate was directed to deliver to the Admiralty Board, to be laid before the King. It is said that not only the Lords of the Admiralty, but his Majesty (Geo. II.) felt much displeasure at the Arrest; while, on the other hand the Court of Common Pleas evinced a determination not to overlook the offence given to them. However, the result was, that instead of receiving satisfaction, the seventeen Admirals and Commanders who composed the Court Martial, were compelled to sign and send a written apology to the Chief Justice, acknowledging that the Resolutions were unjust and unwarrantable, and asking pardon of his Lordship and the whole Court for the indignity offered them. This letter the Chief Justice read in Court, and he directed it to be entered on the Remembrance Roll, as a memorial to the present and future ages that *whoever set themselves up in opposition to the law, or think themselves above the law, will in the end find themselves mistaken.*

The letter, and the Judges' acceptation of it, were inserted in the London Gazette of 15 Nov. 1746.—See Mc Arthur on Courts Mart., vol. 1, pp. 268, 301.—App. xxiv.

When Appeals to the Privy Council commenced, we have not been able to ascertain. Mr. Lemon of the State Paper Office, in his learned preface to the volume of State Papers lately published, mentions that the Registers of the Privy Council do not begin till the year 1540 (32 Hen. 8.); but these, we understand, relate only to matters of State; consequently they do not show the origin of the Appellate Jurisdiction of that Body. However, Mr. Lemon, in a Letter with which he has favoured the Editor, gives it as his opinion, that it began in the Reign of Ed. 6. which lasted from 1547 to 1553. That long previously to this period the Council exercised Jurisdiction, both in Civil and Criminal Cases, there is no doubt; but whether any records of their legal proceedings in those early times are in existence, seems to be uncertain. Mr. Lemon observes, that probably the proceedings of the Court of Star Chamber and the Court of Requests (constituted nearly in the same manner as the present Committees of Privy Council, the members of those Courts being members of the Council), may be regarded as such. If so, the proceedings of those Courts are deposited in the Chapter House at Westminster Abbey. The judicial proceedings of the Privy Council never having been printed, like those of the Lords and Commons, nor being accessible to the public, as those of the ordinary Courts are, it is no wonder, that very little should be known, either respecting the origin of the Appellate Jurisdiction of that important Assembly, or their decisions. It is to be hoped, however, that some useful information on these subjects will ere long be permitted to see the light. The want of that access to which we have alluded, will, we trust, be received as some excuse for any errors or defects in the present little work.

Why an Appeal lies to the Privy Council from the Courts of the Colonies, and to the House of Lords from those of Ireland and Scotland, is not very obvious. It cannot be merely because the Law of England prevails in Ireland, that Appeals from that Country are to the Lords, since the same Law is predominant in

most of our Colonies; and it is not because a different Law is in force in some of the Colonies, that the Appeal is to the Privy Council, as that would be a reason why Appeals from Scotland should be to the Council, inasmuch as the Law of Scotland varies materially from that of England. It is true that there are Scots Lords in the House; so there are in the Privy Council. In short, whatever is the reason, the distinction has long existed, and is likely to continue; and it is attended with this advantage, that it prevents the inconvenience which might ensue from an excess of causes, if there were but one Appellate Jurisdiction.

The number of the Committee who meet to hear Appeals, is we believe indefinite; not fewer than three, and seldom exceeding half a dozen; among whom there is always an eminent member or two of the legal profession, as the Master of the Rolls, the Vice Chancellor, or some other high judicial character.—Sometimes the Lord Chancellor attends.

Since the foregoing was written, a Report made pursuant to the Ecclesiastical Commission, has been published, which expresses the united sentiments of the Chief Justices of the three common Law Courts, the Archbishop of Canterbury, and three Bishops, the Ecclesiastical Judges, and other eminent persons, which of course merits great attention. In considering whether the Jurisdiction which has been exercised by Judges Delegates, should not be transferred to the Privy Council, the Commissioners appear to have been decidedly of opinion, that the Court of Delegates is not well suited to the purposes intended by it, and ought to be abolished. However, it seems they would have had some difficulty in proposing an unobjectionable substitute, if their attention had not been directed* to the expediency of removing the Jurisdiction to the Privy Council, but that they had no hesitation in assenting to that proposition. The Commissioners, therefore, instead of an Appeal to Delegates, appointed as they are at present, recommend that it should be to a Committee of the Privy Council, consisting, among others, of Judges in Equity, the Chiefs of the Common Law Courts, and the Judges of the Civil Law Courts. Whether the attendance of

* By Lord Brougham.

the Chief Justices would not too much interfere with their present important and onerous duties, may deserve consideration.

Should the suggestion of the Commissioners be adopted, it will doubtless occasion a considerable accession of business, in the way of Appeal, to the Privy Council. On this subject some very sensible remarks have appeared in a periodical Publication, from which we have taken the two following passages.

"A part of the proposed plan is to make some arrangement for the attendance of Privy Councillors, conversant with legal principles. This is certainly necessary, to render the tribunal effective. At present it depends entirely on the occasional assistance of the Master of the Rolls, the Vice Chancellor, or any retired Judge, who may be able to attend. This is objectionable on many grounds. So long as there is no regular Judge, there will be no regular bar; business will be conducted in an irregular manner; and this objection, often urged before, may be made with additional force at a time when it is recommended that the Jurisdiction of the Court should be extended.

"We have long thought there should be a complete Appellate Court for the Colonies; that it should not depend on chance for a proper person to decide upon their most important interests. The arrear of Appeals in the Privy Council has been, and is still very considerable; and means should be adopted for disposing of it. A Judge should be appointed to preside exclusively in this Court. It is said, indeed, in the Report (p. 139.), that the presiding Law Lord 'delivers the grounds of his judgment, which being thus known, are reported, tend to settle principles, and to establish uniformity of decision.' They have, however, only been reported* within the last year; and, as the Judge is constantly varying, there is, in fact, very little attention paid to prior decisions."—Legal Observer, vol. ii, p. 81.

Formerly, and until within a recent period, the determinations of the Privy Council were far from being slow; for, being a permanent body, who assemble at all seasons, their sittings are not interrupted by the prorogations or dissolutions of Parliament, and hence cases were, for the most part, brought to speedy deci-

* By Mr. Knapp.

sion. Latterly, in consequence of the increased number of Appeals, they have rather fallen into arrear, and this has chiefly arisen from that want of judicial assistance above noticed; for the hearing of Causes, where the least difficulty occurs, is always attended by some of those learned persons who either are, or have been Judges of the superior Courts, but whose presence cannot be conveniently had as often as might be wished. It is believed and hoped that this cause of delay will soon be removed. The great example of dispatch, which we have just had in the Court of Chancery,* where, by the unparalleled exertions of the eminent and indefatigable Judge who now presides in that Court, a load of business that had been accumulating for a series of years, has been cleared away in a few months, we earnestly trust will be followed in other Courts. Equal speed cannot indeed be expected, without equal powers! Still, the noble precedent must excite emulation. We will now proceed to show,

THE PRACTICE OF APPEALS TO THE KING IN COUNCIL.

The Proceedings on Appeals to the Privy Council are very simple, and easily understood; they are not clogged with nice technicalities, nor impeded by needless formalities; neither are the official fees burthensome. The utmost facility is afforded, and the greatest civility shown to those who have occasion to resort to the Council Office, as indeed is the case in all the higher departments.

The first step in the procedure is a Petition by the Appellant to the King in Council, praying redress, which Petition is referred to the Committee for hearing Appeals from the Plantations, &c. The Respondent is then to enter an appearance. The Appeal is set down for hearing; Cases are prepared, printed, and delivered in by both parties; and a day is appointed to hear Counsel, not more than two on each side. The Committee make their report to his Majesty in Council, which being approved is confirmed, and thus the Appeal is terminated.

* By the same energy, the long list of Appeals in the House of Lords is rapidly diminishing.

It does not appear that there is any limited time for bringing Appeals from the Colonial Courts to the King in Council, as there is for Appeals to the House of Lords; nor are there any printed standing orders for regulating the proceedings, as in that House; but we understand that the Council, generally speaking, observe similar rules to those of the Lords. It is said, too, that in most of the Colonies, Appeals are not allowed after certain periods; and in some of them Appeals are not permitted without leave of the Courts abroad. This is the case at the Cape of Good Hope, where security is given for Costs. But it seems that the Council do not govern themselves by those regulations, for if they see cause, they will not only extend the time for appealing, but grant permission to appeal when it has been refused by the inferior Court.

This is done on Petition to the King in Council; and when leave is granted, an Order to that effect is sent out to the Island, or Settlement; security is there given for the Costs, no Recognizance being entered into here, as on Appeals to the Lords. Authenticated Copies of the proceedings, usually under the Seal of the Governor of the place, are then sent to the Agents of the parties in London.

As soon as an Appeal to the Council (or Cockpit, as it was commonly called) is resolved on, it will be proper to retain Counsel; and this is done in the usual manner, and the like fees are given to Counsel and their Clerks as on Appeals to the Lords. But retainers are not imperative.

Of the Petition of Appeal.

Petitions of Appeal are sometimes drawn abroad, but are often prepared here, and settled by Counsel.

The following is the form:—

To the King's most Excellent Majesty in Council.

The humble Petition and Appeal of A. B., of, &c.
Sheweth,

That—(here set forth a concise Statement of the Case, the proceedings in the Court below, and the Decision, especially that part of it deemed objectionable.)

That your Petitioner conceives and is advised, that the Decree (Order, Sentence, or Judgment as the case may be), is erroneous, and therefore humbly Appeals therefrom to your Majesty.

Your Petitioner, therefore, most humbly prays that your Majesty in Council, will be pleased to reverse or rescind the said Decree (Sentence, &c.), and to order and direct (here state what is wished to be ordered), and that the said C. D. may be ordered to pay your Petitioner's Costs of this Appeal; or that your Majesty will be pleased to grant unto your Petitioner, such other relief in the premises as to your Majesty in Council shall seem just.

And your Petitioner will ever pray, &c.

A. B.

This Petition need not be signed by Counsel, nor is any Certificate of Cause required, as in Appeals to the House of Lords. It is to be fairly written on plain paper, book ways, in words at length, excepting dates and sums, and is taken to the Council Office, Whitehall, with the authenticated proceedings, which, after being inspected, are returned.

Upon this Petition an Order is made by the King in Council, referring it to the standing Committee of Council for hearing Appeals from the Plantations.

Of the Respondent's Appearance.

In general the Respondent appears to the Appeal on or soon after its being presented; for when litigants in the Colonies determine on appealing to this country they give notice to their opponents, and it is believed that in most, if not in all our foreign possessions, Appeals are allowed only on entering into security for costs. Consequently the parties Respondent have an opportunity of sending instructions to England to appear and defend. No answer is put in, as on Appeals to the Lords.

Of Preparing the Case.

The next thing usually done is, to prepare the case on each

side, which is signed by one or two Counsel, in like manner as cases in the House of Lords, and about 50 copies only need be printed, 25 of which are left at the Council Office; no more than two Counsel are *heard* on each side, though three sometimes attend. The case is commonly signed by one or both of the Counsel who are to argue, but this rule is not rigidly observed.

Each party also generally prepares and gets printed an Appendix to his Case, which contains copies of the various proceedings and the Judgment in the Court below, with any collateral matter proper for the Council to be informed of. In some cases, when both parties agree upon the contents of the Appendix, and especially if the proceedings run to a great length, they, in order to save expence, concur in having a joint Appendix printed.

The Fees to Counsel for signing the Case, attending to argue, and for Consultation, are the same as on Appeals to the Lords.—See Pract. of App. 53, 66.

Prints of the Cases are exchanged, as in the House of Lords; but if either party is not prepared, or omits to exchange in due time, the other should deliver in his Cases under seal.

The following is the form of the Case:—

In the Privy Council.

Between A. B.....Appellant,

and

C. D.....Respondent.

On an Appeal from Calcutta (or as the fact is).

The Case of the Appellant (or Respondent).

The facts and proceedings are set forth, and the reasons added, as on Appeals to the House of Lords; and the case is endorsed as follows:—

In the Privy Council.

A. B.....Appellant,

and

C. D.....Respondent.

Case of the Appellant (or Respondent).

To be heard at the Council Office, Whitehall, on the day of 1831.

Agent's name at the Foot.

The Appendix is entitled in like manner as the Case, and is endorsed,

Appendix to the Appellant's (or Respondent's) Case—or Joint Appendix to the Cases of the Appellant and Respondent.
Agent's name at the Foot.

The Appellant having lodged his Case, the cause is set down, and when a day is fixed by the Committee for the hearing, notice is sent to the parties' agents in the following form :—

Council Office, Whitehall,
The June, 1831.

The Right Honourable the Lords of the Committee of Council for hearing Appeals from the Plantations, &c. having appointed to meet in the Council Chamber, Whitehall, on the day of at 10 o'clock in the forenoon, to hear the Appeal of against from Bengal in the East Indies: These are, therefore, to give notice to all parties therein concerned, to come prepared to be heard thereupon, by their Counsel learned in the law, at the said time.

A. B. (Clerk of the Council.)

This notice is generally short, for which reason the agents should be in frequent attendance, in order to learn when the hearing is likely to take place, that they may fee Counsel, hold a consultation, and be fully prepared.

How to proceed if the Respondent does not appear.

If the Respondent neglects to appear, after a reasonable time application is made at the Council Office, for a Summons or Notice to the Respondent, to appear to the Appeal and defend it; the Council then fix a day for the hearing, and order a Summons to be issued, which is in the following form :—

Council Office, Whitehall,
10th of August, 1831.

Whereas the Right Honourable the Lords of the Committee of Council for hearing Appeals from the Plantations, &c., have appointed to meet at the Council Chamber, at Whitehall, on Thursday, the 13th day of October next, at 12 o'clock at noon,

to hear the Appeal of A——— against B———, from an Order of the Supreme Court of Judicature at Madras, of the 29th September, 1827, overruling a Plea of the Appellant, to a Bill filed in the said Court against him by the Respondent: And whereas no appearance has been hitherto entered for the said Respondent, notwithstanding it is three years and upwards since the said Order was pronounced, These are, therefore, to give notice to the said Respondent, that he do forthwith enter an appearance to the said Appeal, and come prepared to be heard thereupon, by his Counsel learned in the Law, on the said 13th day of October next.

(Signed) W. L. Bathurst (Clerk of the Council.)

Copies of this notice are to be affixed at the Royal Exchange, Lloyd's Coffee-house, and, in case of Appeals from India, the East India House, and the East India Coffee-house; at each of which places a few shillings are paid for the permission to post them up.

It appears from the foregoing notice, that the Council will appoint a day for the hearing before an appearance is entered.

Instructions on the part of the Respondent.

The directions hitherto given, chiefly relate to what is to be done by the Appellant. On the part of the Respondent, it is not thought requisite to say more, than that his Agent, on receiving his instructions, should apply at the Council Office, enter an Appearance, and bespeak a copy of the Appeal. He should then prepare, exchange, and deliver in his Case, and get ready for the hearing in the same manner as the Appellant.

Should the Respondent finally omit to appear, the Appeal will be heard *ex parte*.

Of the Hearing and Judgment or Report.

Upon the Hearing of the Appeal, all that is requisite to be produced, is the authenticated Copy of the proceedings, and any original Documents produced on the Hearing in the Court below, not fully stated in the proceedings or Record.

At the conclusion of the hearing, the Committee, in cases which admit of no doubt, declare their opinion immediately: in others, they take time to consider of the decision, and generally mention a day for announcing it. No public discussion takes place; consequently, if a difference of opinion should arise, as must occasionally happen when there are more Judges than one, the points of disagreement do not appear; nor was it, until very lately, customary to give the reasons at large on which the Judgment was founded. So the Courts of law, formerly, on cases sent to them from the Court of Chancery, did not state the grounds of their opinion, merely certifying the result to the Lord Chancellor. But Lord Mansfield, in the year 1774,* departed from the previous usage, and assigned the reasons, thus breaking the line (if one may so speak) of judicial silence; and the like is now done at the Council table.

When, after due deliberation, the Committee have formed their opinion, they fix on a day (if not done when the Appeal was heard) for making it known, of which notice is sent to the respective Agents. In case there are any material variations, or special directions, minutes of the report are made out for the perusal of the parties. As soon as the Judgment is fully settled, their Lordships make their Report to his Majesty, recommending the Decree, Sentence or Judgment complained of, to be affirmed, reversed, or varied, as they think Justice requires; and when the Report receives the Royal sanction, an Order embodying it, is made out, and delivered to the parties.

Forms of Reports or Judgments.

The following is the Form of a Report, partly affirming and partly reversing a decree:—

To the King's most Excellent Majesty.

21st June, 1828.

May it please your Majesty,

Your Majesty having been pleased, by your Order in Council

* See Cowp. Rep. 34.

of the 14 of June 1825, to refer unto this Committee the humble Petition and Appeal of Francis Balston, late of Cape Town, at the Cape of Good Hope, Mariner, against Daniel Jacob Cloete, in his capacity of acting Agent of The Honourable East India Company, setting forth, That—(*Here the Case is stated.*)

That the Appellant, on the 17 day of May 1821, commenced an Action in the Worshipful Court of Justice at Cape Town, against the said J. C. in his said capacity of Agent to the said Company, for the recovery of damages, as a compensation for the losses so incurred by such seizure and detention. That the said J. C. appeared to such Action in his said capacity of Agent, and defended the same.

That on the 13th of June 1822, the said Court pronounced its decree in such Suit, and thereby rejected the claim, and condemned the Appellant in the Costs of the said Suit. That the Appellant, considering himself aggrieved by the said Decree, on the 16th of the same month appealed therefrom to the Right Honorable the Court of Appeals, in Civil Cases, for the said Colony, which was allowed accordingly. That the said Appeal having come on to be heard, the said Court of Appeal, on the 20th of April 1824, pronounced its Sentence, and thereby affirmed the Sentence of the said Worshipful Court of Justice, and condemned the Appellant to pay to the Respondent 300 Rix Dollars for his Costs in Appeal.

That the Appellant feeling himself aggrieved by such sentence, on the 22d of the same month begged to Appeal therefrom to your Majesty in Council. That on the 6th of May following, such Appeal was duly allowed, upon Security being given by the Appellant within fourteen days from the day last mentioned.

That the Appellant duly gave such Security within the time limited, and was advised that the said Decree of the Worshipful Court of Justice of the 13th of June 1822, and the Judgment of the said Court of Appeal affirming the same, were erroneous and contrary to Law. And humbly praying that the said Decree, and the Judgment affirming the same, might be respectively reversed; and that such compensation might be decreed

and paid to the Appellant, for the losses and damages incurred by the premises, as might be just, together with Costs, and for other relief in the premises. The Lords of the Committee, in obedience to your Majesty's said Order of reference, this day took the said Petition and Appeal into consideration, and were attended by Counsel on both sides thereupon, and (by consent of the parties) their Lordships do agree humbly to report, as their opinion, to your Majesty, that the Decree of the Court of Justice at the Cape of Good Hope, of the 13th of June 1822, and also the Decree of the Court of Appeals in Civil Cases, in the said Settlement, of the 20th April 1824, should be affirmed, except in so far as the said Decrees condemn the Appellant in Costs, and that as regards such condemnation, the said Decrees should be reversed.

The following is the form of the Order of the King in Council on the Report.

At the Court at St. James's,
the 28th June, 1828.
Present
The King's Most Excellent Majesty,

Lord Chancellor,	Mr. Secretary Peel,
Lord President,	Sir George Murray,
Lord Privy Seal,	Mr. Herries,
Lord Chamberlain,	Lord Francis Leveson
Duke of Leeds,	Gower,
Lord Stewart,	Mr. Hobhouse.

Whereas there was this day read at the Board a Report from the Right Honorable the Lords of the Committee of Council for hearing Appeals from the Plantations, &c. dated the 21st inst. in the following words, viz. (*Here the Report is set forth.*)

His Majesty having taken the said Report into consideration, was pleased, by and with the advice of His Privy Council, to approve thereof, and to order, as it is hereby ordered, that the Decree of the Court of Justice at the Cape of Good Hope, of 13th of June 1822, and also the Decree of the Court of Appeals

in Civil Cases in the said Settlement, be, and the same are, hereby affirmed, except in so far as the said Decrees condemn the Appellant in Costs; and that, as regards such condemnation, the said Decrees be, and the same are hereby reversed. Whereof the Governor, Lieutenant Governor, or Commander in Chief of the Cape of Good Hope for the time being, and all other persons whom it may concern, are to take notice, and govern themselves accordingly.

(Signed) C. C. Greville.

Minutes of a Report of the Council varying a Decree.

24 June, 1816.

Bruce *v.* The E. I. C. Bengal.

Their Lordships agree to report, That the Decree of the Supreme Court of Judicature at Fort William in Bengal, of the 5th of November, 1812, should be reversed, and that the Appeal should be dismissed, so far as it prays that—(*here part of the prayer is set forth.*) But their Lordships further agree to report that it should be decreed, that the Respondents, the said United Company, should pay to the Appellant the sum of Bombay rupees 25,000, together with interest thereon at the rate of 8 per centum per annum, from the 1st of March, 1811, to the 28th of the same month, both inclusive, at the rate of 100 Sicca Rupees for 108 Bombay rupees.

The Report of the Committee, and the King's Order in Council, were in conformity to the foregoing Minutes.

The following contains a Report and Order of Council, affirming a Decree of the Court at Bombay: -

At the Court of St. James's,

the 8th June, 1831.

Present

The King's Most Excellent Majesty.

Lord President, and ten other Members of the Council.

Whereas there was this day read at the Board a Report from the Right Honorable the Lords of the Committee of Council for

hearing Appeals from the Plantations, &c. dated the 21st May last, in the words following, viz:—

> Your Majesty having been pleased, by your Order in Council of the 11th of May instant, to refer unto this Committee the humble Petition and Appeal of Luximan Row Sadasew, a native of Bombay in the East Indies, setting forth, That in a Suit depending between the Appellant and Mullar Row Bagee, respecting the right of succession to the property of the Appellant's late adopted father, Sadasew Mankeshwer, deceased, the same was referred to Captain Robertson, acting Magistrate of Poonah, and W. Lumsden, Esq. one of his Assistants, who were pleased to make their award thereupon, in the month of March, 1820. That the Appellant, feeling himself aggrieved by the said award, petitioned to be allowed to appeal therefrom to the Governor in Council at Bombay, which Petition was allowed, and the said Governor in Council, after hearing the parties in the said appeal, and the several matters connected therewith, was pleased, by a Minute in Council bearing date the 20th of August, 1822, to pronounce his Judgment, dismissing the said Appeal. That the Appellant feeling still further aggrieved by the Judgment of the Governor in Council affirming the said award, prayed and was allowed an Appeal therefrom to your Majesty in Council: and humbly praying that the Decree contained in the said Minute of the 20th August, 1822, may be reversed or set aside, and the Appellant declared entitled to succeed to the whole property acquired by the exertions of his said adopted father, and for such other relief as to your Majesty shall seem meet: The Lords of the Committee, in obedience to your Majesty's said order of reference, this day took the said Petition and Appeal into consideration; and having heard Counsel on both sides thereupon, their Lordships do agree humbly to report as their opinion to

your Majesty, That the Decree of the Governor in Council of Bombay, of the 20th August, 1822, should be affirmed, and that the Costs of this Appeal, both of the Appellant and the Respondent, should be paid out of the property in question.

His Majesty having taken the said Report into consideration, was pleased, by and with the advice of his Privy Council, to approve thereof, and to Order, as it is hereby Ordered, That the Decree of the Governor in Council at Bombay, of 20th of August, 1822, be and the same is hereby affirmed, and that the Costs of this Appeal, both of the Appellant and the Respondent, be paid out of the property in question. Whereof all persons whom it may concern, are to take notice, and govern themselves accordingly.

(Signed) W. L. Bathurst.

In the preceding Case two things are observable—1st. That an Appeal was allowed from an award. As this may appear extraordinary, it may be proper to state that the place where this decision occurred, was newly conquered territory, in which there was no seat of Justice, and that the award was more in the nature of a Judgment of the native Court than an award on a submission to arbitration.—2dly. That though the Decree confirming the award was affirmed, yet both parties were ordered to be paid the Costs of the last Appeal, out of the property in question. This differs from the rule as to costs in the House of Lords, who do not give the Costs of the Appeal to an Appellant on a reversal, however erroneous or improper the decision of the inferior Court may have been.

Of Costs.

Formerly, when Costs were awarded to the Respondent, by reason of the Appeal's being vexatious or frivolous, their Lordships gave a round sum, 30, 40, or 50*l.*, but of late years they generally adjudge full Costs in such cases, and it is referred to a Master in Chancery to ascertain the amount, which is inserted in the Order of Council. This being sent to the Island or Colony, the final Judgment is there entered up, and carried into execution.

It does not appear to be the practice to present Cross Appeals to the Privy Council, when a Respondent is dissatisfied with the decision, as is done in the House of Lords; nor does it seem to be requisite; for the Council, in giving their Judgments, do not consider what is right to be done towards the Appellant only, but they also determine what is equitable in favour of the Respondent, thus dispensing equal justice to each party.

Of Interlocutory or Collateral Proceedings.

Circumstances may arise pending Appeals to the Privy Council which will render it necessary to apply to their Lordships; such as the Respondent's omitting to appear, or the Appellant's neglecting to proceed, or where parties wish to expedite or postpone the hearing. In such or similar cases, application is made by petition, addressed "To the Right Honourable the Lords of the Committee of Council for hearing Appeals from the Plantations, &c.

When it is intended to present Petitions for the foregoing, or other purposes, it will be proper to give notice to the opposite parties, or their Solicitors, as is done in Parliamentary Appeal Cases.

We are not aware that those who act as Solicitors or Agents in matters of business before the Privy Council, are required to be admitted as Attorneys or Solicitors of any of the Courts of Westminster Hall.

It appears to have been for some time earnestly desired by the legislature to expedite, simplify, and reduce the expence of all judicial proceedings. In the Editor's humble opinion, those of which he has been treating, might very easily be simplified, and some delay and expence prevented, by empowering the Committee of Council for hearing Appeals, to proceed on them immediately, without a specific reference in each case from the King, as at present; and to pronounce final judgment at once, and without making a report to his Majesty, which really seems to be a needless and useless formality. The King is supposed to preside in our first Law Court, and the Judgments are nominally

given by his Majesty's sanction, which is all a fiction. Would it not be an extreme inconvenience if they were actually to receive it? His Majesty is also presumed to be present on giving Judgments in Parliament, but they are in fact given by the Lords, and never submitted to the King. Even upon claims of Peerage, referred by the King to the House of Peers, their Lordships give the Judgment, which is final, without further sanction or confirmation. What good reason, then, can be offered against the Council's adjudging in the same manner, the Judgment being in truth theirs, though in form the King's? However, for the sake of greater solemnity, it may still be in his Majesty's name, and purport to be pronounced "by our Lord the King in his Privy Council," as Judgments of the House of Lords are said to be given by the King in Parliament.

The following are the usual Fees paid at the Council Office upon Appeals.

By the Appellant.

	£	s.	d.
On lodging Appeal	1	1	0
Order of Reference	3	2	6
On lodging printed Cases	1	1	0
Setting down Appeal	1	1	0
Order for Hearing	1	12	6
Summons for ditto	0	10	0
Copy Minutes	1	0	0
*Committee's Report to the King	4	10	0
*His Majesty's Order approving Report	6	12	6
*Duplicate, if required	5	12	6
Delivering Cases at the Lords' houses	0	10	0
Gratuity	2	2	0

By the Respondent.

Entering Appearance	0	10	0
*Office Copy Appeal	3	10	0
On lodging Cases	1	1	0
Order for Hearing	1	12	6
Summons	0	10	0
Copy Minutes	1	0	0

*Copy Report	4	10	0
*The King's Order	5	12	6
Gratuity	2	2	0

The charges marked * vary according to length.

When there is a Petition for leave to Appeal, the Appellant pays—

On lodging Petition	1	1	0
Reference	3	2	6
Report	1	10	0
Final Order	3	2	6

When a party petitions for leave to defend, he pays the like Fees.

Bill of Costs for an Appellant *on an Appeal from Bengal.*

Before the King in Council.

Appeal from the Supreme Court at Calcutta.

G——— and Others.....Appellants.

and

R——— and Others .....Respondents.

1790.	£	s.	d.
Agent's retaining Fee	1	1	0
Attending in Pall Mall to receive the proceedings	0	13	4
Attending taking Instructions to retain Counsel, and conferring	0	13	4
*Attending to retaining Mr. Piggott	0	13	4
Paid him retaining Fee	2	2	0
To his Clerk	0	5	0
Close Copy of the Proceedings in the Supreme Court at Calcutta for Agent, 480 folios, at 8*d.* per fo.	16	0	0
Perusing the same preparatory to drawing the Petition of Appeal	5	5	0
Drawing Petition of Appeal, folio 108, at 1*s.* 6*d.* per folio	8	12	0
Fair Draft Copy thereof	3	5	4

* Retainers are not necessary in Cockpit Appeals, as in the House of Lords, except for the sake of securing particular Counsel.

Fee to Mr. Cooke to peruse and settle same - -	5	5	0
To his Clerk - - - - -	0	5	0
Attending him several times thereon - -	0	13	4
Ingrossing same to present - - -	5	8	0
Attending therewith at the Council Office - -	0	13	4
Paid on lodging same - - - -	1	1	0
Paid for Order of Reference, with Copy Appeal annexed - - - -	4	12	6
Copy of the Appeal to send to India - -	3	5	4
Attending at the Council Office, to get the Appeal referred to a Committee - - -	0	13	4
Attending to get the Order drawn up and signed -	0	13	4
Attending to search if Respondents had appeared -	0	13	4
Attending at the Council Office to apply for Order for hearing, and Summons to set up in the Royal Exchange - - - -	0	13	4
Paid for the Order and Summons - - -	3	3	6
Attending for same - - - -	0	13	4
Three Copies to fix up in the Royal Exchange, at the India House, and at the East India Coffee House - - - - -	0	15	0
Attending for that purpose - - -	0	13	4
Paid the usual Fees - - - -	0	15	0
Attending several times to search for Appearance -	0	13	4
*Drawing the Appellants' Case - - -	5	5	0
Drawing Brief of the Proceedings in the Court below, Thirty Sheets - - - -	10	0	0
Three Copies thereof for Counsel and Agent -	15	0	0
Fair Copy of the Case for Mr. Cooke to settle and sign - - - - -	1	15	0
Attending him with same to settle, and several times thereon - - - -	1	1	0
Fee to him and Clerk - - - -	5	10	0
Copy of the Case as settled by Mr. Cooke to lay before Mr. Piggott - - -	1	15	0

* The rule of charging is £5. 5s. for each printed sheet.

Paid Fee to him to peruse and sign same, and Clerk	5	10	0
Attending him	0	13	4
Copy of the Case for the Printer	1	15	0
Attending and instructing the Printer	0	13	4
Examining and correcting the Proof Sheet	1	1	0
Paid the Printer's Bill	5	5	0
Attending several times at the Council Office to get a day appointed for the Hearing	0	13	4
Paid for Summons	0	16	8
Attending to get Cause set down	0	13	4
Paid	1	1	0
*Copies and Service of Order and Summons	0	10	0
Attending the Respondent's Agent to exchange Cases, but his Case was not prepared	0	13	4
Attending thereupon at the Council Office to deliver in the Appellant's Case under Seal	0	13	4
†Paid Fee thereon	0	10	6
Attending afterwards to exchange Cases with the Respondent's Agent	0	13	4
Perusing the Respondent's Case and comparing it with that of the Appellant, and making Observations thereon, and Copy	1	1	0
Two Copies of Observations for Counsel	0	15	0
Attending to deliver Cases at the Houses of the Lord Chancellor, and other Law Lords who usually attend	1	1	0
Drawing a Summary Statement of the Proceedings, and an Index for Reference	1	6	8
Two Copies thereof	0	13	4
Paid Fee to Mr. Piggott to argue	10	10	0
To his Clerk	0	7	6
Attending him	0	13	4
Fee to Mr. Cooke and Clerk	10	17	6
Attending him	0	13	4
Many Attendances at the Council Office to learn			

* This is not strictly necessary, as notice is sent from the Council Office.

† The fee is now £1. 1s.

whether the Appeal was likely to be heard on the appointed day	0	13	4
Attending the Counsel to fix a time for a consultation	0	13	4
Having received Notice that the Hearing was postponed for some days, attending to inform the Counsel thereof, and to get the Consultation put off	0	13	4
Attending several times at the Council Office, to learn when the Cause would come on	0	13	4
A Day having been appointed for the Hearing, attending the Counsel to name a time for the Consultation	0	13	4
Attending Consultation at Mr. Piggott's	1	6	8
Paid Fee to him	5	5	0
*To his Clerk and Servant	0	7	6
Fee to Mr. Cooke	5	5	0
Attending the Hearing, Self and Clerks, with the papers, when the Order was affirmed without Costs	2	2	0
Paid for Copy Order	1	11	6
Copy to send abroad	0	10	0
Writing Letters, Coach hire and Messengers	1	11	6

Bill of Costs for Respondent *on an Appeal to the Privy Council from the Supreme Court of Judicature at Calcutta.*

A. B.....Appellant,
and
The E. I. C.....Respondents.

1816.

Attending taking Instructions to defend, and attending at the Council Office to enter Appearance and bespeak Copy Appeal	2	2	0
Paid entering Appearance	0	10	0
Paid for Office Copy Appeal (according to length)	3	10	0
Attending for, and to examine the same	0	13	4

* Only the senior counsel's clerk was formerly paid any thing on Consultations.

Copy thereof	1	1	0
Perusing Transcript of the Proceedings in the Supreme Court of Bengal, upwards of 300 closely-written pages	21	0	0
Drawing the Respondent's Case, seven printed sheets, at five guineas each	36	15	0
Fair Copy to settle	12	5	0
Drawing the Appendix,* ten printed sheets, at 2*l.* 12*s.* 6*d.* each	26	5	0
Fair Copy	17	10	0
Drawing Brief of the Proceedings in the Supreme Court at Bengal, 120 brief sheets at 13*s.* 4*d.* each	80	0	0
Fair Copy for Counsel, at 5*s.* each	30	0	0
Fair Copy of the Notes of the Judge's Arguments on giving Judgment in the Court abroad, six brief sheets	1	10	0
Paid Fee to Mr. Wyatt to settle Case	21	0	0
To his Clerk	1	1	0
Attending him	0	13	4
Fair Copy Case as settled by Mr. Wyatt, for Mr. Serjeant Bosanquet to peruse and sign	15	0	0
Paid him	21	0	0
To his Clerk	1	1	0
Attending him	0	13	4
Fair Copy for Sir Arthur Piggott	15	0	0
Fees to him and Clerk	22	1	0
Attending him	0	13	4
Copy Case for the Printer	12	5	0
The like of the Appendix	17	10	0
Attending him therewith, and very many times during the Printing	2	2	0
Examining and correcting the Proof Sheets of the Case and Appendix, 17 printed sheets	17	17	0
Paid the Printer's Bill			

* The Appendix, consisting mostly of Copies, is charged for at a less rate than the Case.

Attending exchanging Cases with the Appellant's Solicitors	0	13	4
Perusing the Appellant's Case	2	2	0
Attending at the Cockpit with Respondent's Case	0	13	4
Three Copies of such parts of the Proceedings as were not contained in the Appendix, to be ready for Counsel at the hearing, 36 Brief Sheets each, at 5s. per Sheet	27	0	0
Three Copies of the Notes of the Judges' Arguments in the Court abroad, for Counsel, 6 Brief Sheets each	4	10	0
Many Attendances at the Council Office to learn when this Appeal was likely to come on to be heard	1	1	0
The Cause day being appointed, reperusing and arranging the several papers preparatory to the Hearing	5	5	0
Paid Sir A. Piggott with Brief and Instructions	26	5	0
To his Clerk	1	1	0
Attending him	0	13	4
*The like fees to, and Attendances on the other two Counsel	55	18	8
Attending the Counsel to get an Appointment for a Consultation	0	13	4
Consultation Fees to Counsel and their Clerks, each £5. 15s. 6d.	17	6	6
Attending the Consultation	2	2	0
Attending the hearing when their Lordships signified that they should give their Judgment on the 27th	5	5	0
†Paid Sir A. Piggott his Fee for attendance to hear Judgment, and gave his Clerk	10	15	0
Attending him	0	13	4
The like to the other Counsel	22	16	8
27th.—Attending at the Council this day, when their Lordships agreed to Report that the Decree of the Supreme Court at Bengal should be varied	5	5	0

* Only two Counsel on each side are *heard*.

† This is quite unusual in ordinary cases.

Having received from Mr. Litchfield the minutes of their Lordships' Report, perusing the same, and suggesting some alterations in the Form -	1	1	0
Copy to keep - - - - -	0	10	0
Attending at the Council Office therewith -	0	13	4
August—Many attendances at the Council Office to obtain His Majesty's Order - -	2	2	0
Upon obtaining His Majesty's Order in Council, making a Report thereon to the Respondents, and attending to bespeak a Duplicate thereof, to be sent to Bengal - - - - - -	2	2	0
Copy of the Order to keep, 9 Brief Sheets -	2	5	0
Paid Fees at the Council Office as undermentioned:—			
Fee lodging Cases - - - £1 1 0			
Order for Hearing - - - 1 12 6			
Summons for ditto - - - - 0 10 0			
Copy Minutes of Decree - - 1 0 0			
Committee's Report to the King - - - 4 10 0			
Order of His Majesty,-approving-same - 6 12 6			
Duplicate - - - 5 12 6			
Delivering Cases at Lords' Houses - 0 10 0			
Usual Gratuity - - - 2 2 0			
	23	10	6
Coach hire, Messengers, and Petty Expences -	2	2	0

If the Costs should be referred to a Master, the consequent charges are, of course, to be added.

It will be observed, that some of the charges in the latter of the preceding Bills, are higher than those in the former; but it should be considered that the first Bill is above 40 years old, and the second posterior to it nearly 30 years; that in the intervening time there has been an increase in Solicitors' fees in the Law Courts, and a much greater advance in the necessaries as well as comforts of life. There is no fixed rule of charging in matters of Appeal; so that it is in a great degree discretionary. Still it ought to be moderate and reasonable.

After the preceding pages were printed, the Editor was favoured with the perusal of the papers in an Appeal from a decision of the Court of Chancery of Jamaica, in a Cause of Beckford and Campbell, whence he has derived information of which he was not previously possessed.

By the proceedings in that Case, it appears there were cross Appeals to the Privy Council, though there are very few instances of such Appeals. Another circumstance also occurred in the same Case, which, it is believed, very seldom takes place, namely, a reference to a Master in Chancery here, to review the Report of a Master of the Jamaica Court of Chancery; which reference was made by the Lords of the Committee, of their own authority, without an Order from the King in Council.

That the Council possessed or exercised the power of making such Reference, the Editor was not before aware; neither has he been able to learn on what authority it is founded; nor when it was first, if ever previously practised. As Masters in Chancery are assistants to the House of Lords, it may be presumed that their Lordships could, if they chose, in the Case of Appeals from Ireland or other inferior Courts, make a reference to them. But we believe no such thing is ever done; nor do their Lordships even call on the Masters to ascertain the Amount of Costs, as has of late been done by the Privy Council. This indeed is attended with a little trouble, and might be asked as a matter of curtesy, as is done by the officers of the Courts of Westminster Hall, where Bills of Costs, ordered to be taxed, contain proceedings in different Courts; but a reference of the former description, may, and auctually did in the case of Beckford and Campbell above mentioned, occupy many years. Consequently, such references, if they were frequent, would consume a great part of that time, which, it has generally been understood, should be entirely and exclusively devoted to the Chancery Suitors of this Country, except so far as their attendance is required in Parliament.

The following is an abstract of the proceedings in the Appeal of Campbell and Beckford.

By an order, dated "Council Chamber, Whitehall, the 24th

October 1801, by the Right Honourable the Lords of the Committee of Council for hearing Appeals from the Plantations," reciting his Majesty's order in Council, bearing date the 15th of January 1800, referring to their Lordships the Petition and Appeal of William Beckford, Esq. against John Campbell, Esq. and others, complaining of an order of the Chancellor of Jamaica, overruling exceptions to the Master's report therein mentioned; and also reciting his Majesty's orders in Council, of the 7th of May, and 25th of June 100, referring to the Committee the Cross Appeals of Campbell and other parties, complaining of part of the said order; the Lords of the Committee, having heard Counsel &c., were pleased to order that it be referred to John Spranger, Esq., one of the Masters of the High Court of Chancefy, to review the report of the Master in Jamaica, in the particulars in their Lordships' order mentioned; and their Lordships directed that the parties should be examined upon interrogatories; that they should produce all books, papers, &c.; and that they should be at liberty to apply to the Committee, if so advised: all further directions were reserved until the Master should have made his report.

Very little was done in Master Spranger's office before his death; and by an order of the Lords of the Committee, made in June 1804, the case was referred to his successor, Master Stanley. Several proceedings were had before that Master, but he also died without having made a report; and by an order of the Committee made in June 1811, Master Stephen, who succeeded him, was appointed in his room. These orders were made on Petitions to the Committee.

Pending these proceedings, Mr. Campbell, one of the parties, died, by which they became abated; and by an order of the Committee, made in April 1803, the Appeal was revived, upon the application of his Widow and Executrix. She also having died, the proceedings were again revived, by an order dated in May 1810, at the instance of Mr. Campbell's personal representative.

In the month of August 1814, Master Stephen made his report; and after a suspension of proceedings for several years,

viz. in January and February 1819, several hearings were had before the Council, but we understand these Appeals remain still undetermined. The litigation principally, if not entirely, respected matters of account; a subject with which Courts of Equity are scarely ever competent to deal. Of this there can hardly be a stronger instance than is furnished by the preceding case. The suit commenced in Jamaica above 47 years ago; the reference to Mr. Spranger was 30 years since. Both he and Mr. Stanley had been men of great experience, and extensive Equity practice at the Bar. Mr. Stephen, in addition to his acknowledged abilities, possessed the advantage of having practised in the West Indies. The Solicitors concerned were men of considerable professional talent; and the sum claimed to be due from Mr. Beckford is very large; and yet to this day the suit is unfinished.

It may not be improper to give the following additional forms:—

The Form of an Order appointing a Day for hearing an Appeal.

At the Council Chamber, Whitehall, the 19th July 1800.

By the Right Honourable the Lords of the Committee of Council for hearing Appeals from the Plantations.

Whereas his Majesty was pleased, by his Order in Council of the 7th day of May last, to refer unto this Committee, the humble Petition and Appeal of J. C., Esq. from so much of an Order of the Court of Chancery of the Island of Jamaica, of the 10th of June 1799, as overruled the Appellant's objection to the Marster's report, made on the 4th of April 1799, in a Cause upon a Bill filed in the said Court, on the 21st of April 1784, by the Appellant against W. B., Esq. for an account and reconveyance of certain Estates therein mentioned, and praying that the said order may be reversed; And Whereas a motion was this day made to their Lordships, praying that a day may be appointed for hearing the said Appeal; their Lordships are therefore pleased to order that the said Appeal be heard at this Committee on Saturday, the 8th day of November next, at 12 o'clock at noon.

(Signed) Stephen Cottrell

Form of Notice or Summons to attend Hearing.

Council Office, Whitehall, 9th October 1801.

The Right Honourable the Lords of the Committe of Council, for hearing Appeals from the Plantations, &c., having appointed to meet in the Council Chamber *at the Cockpit,** Whitehall, on Friday, the 16th day of this instant October, at 10 o'clock in the forenoon, to hear the Appeal of C. against C., and the Cross Appeals between the said parties, from Jamaica; These are therefore to give notice to all parties therein concerned, to be come prepared to be heard thereupon, by their Counsel learned in the Law, at the said time.

Signed W. Fawkner.

Form of Notice of further Hearing.

This is the same as the foregoing, except that instead of saying "*to hear,*" the words are, "*to proceed in the further hearing of*" the Appeal, &c.

Form of Petition to revive Appeal.

In the Privy Council.

Between W. B., Esq..... Appellant,
and
J. C., Esq. and others, Respondents,
and
Between J. C., Esq. and others Appellants,
and
W. B., Esq..... Respondent.

To the Right Honourable the Lords of the Committee of Council for hearing Appeals from the Plantations.

The humble Petition of J. G. C. of ———, Esq.

Sheweth,

That his Majesty was pleased by his order in Council, bearing date, &c. (Here state the substance of the order referring the Appeal.)

That his Majesty was also pleased by his orders in Council,

* The words in *Italics* are now omitted.

bearing date, &c. (Here state the order referring the Cross Appeals.)

That on a motion made to your Lordships on the day, &c. praying that in regard the said I. C. was dead, and the said Appeal and cross Appeals were thereby become abated, the same and the proceedings thereon might be revived, by making Helen, the Widow and Executrix of the said I. C., a party thereto in his room, your Lordships were pleased to order that the said Appeal, cross Appeals, and proceedings should be revived, and that the said H—— C —— should be made a party thereto, and stand in the place of the said I. C., deceased.

That the said H. C. has lately departed this life, and the said Appeal, Cross Appeals, and proceedings, are thereby become abated, and Administration, *de bonis non*, to the said I. C., with his Will annexed, has since her death been granted by the Prerogative Court of the Archbishop of Canterbury to your Petitioner, who is thereby become his legal personal representative.

Your Petitioner therefore humbly prays your Lordships that the said Appeal, Cross Appeals, and the proceedings thereon may be again revived, and that your Petitioner may be made a party thereto, and stand in the place of the said I. C., deceased.

And your Petitioner will ever pray, &c.

Notice of presenting this Petition should be given, and it may be as well to serve a Copy of the Petition.

Form of Notice of Petition.

In the Privy Council.

Between—(State Title of the Appeal.)

Take Notice that the Committee of Council for hearing Appeals, &c., will be moved by Petition at the Instance of I. G. C., Esq., Administrator, *de bonis non*, of the said I. C. deceased, on the day of next, or as soon after as the said Petition can be heard, that the Appeal, Cross Appeals, and proceedings between the parties above named, which are become abated by the death of H. C. the Widow and Executrix of the said I. C. deceased, may be re-

vived, by making the said I. G. C. a party thereto in her place. Dated, &c.

A. B., Agent for the said I. G. C.

To Mr. C. D., Agent for
the said W. B.

Form of Order to Revive.

At the Council Chamber, Whitehall, the 29th May, 1810.

By the Right Honourable the Lords of the Committee of Council for hearing Appeals from the Plantations, &c.

Whereas his Majesty was pleased (here the orders of reference are recited.) And whereas a motion was this day made to their Lordships, praying, in regard H. C., the Widow of the said I. C., who was made a party to the said Appeals in his room, by an Order of your Lordships, bearing date the 21st of April, 1803, is dead, and the said Appeal and Cross Appeals are thereby become abated, that the same, and the proceedings thereon, may be revived, by making I. G. C., Esq., Administrator, *de bonis non*, with the Will annexed, of the said I. C. his late Father, deceased, a party thereto in his room; The Lords of the Committee are therefore pleased to Order that the said Appeal, and Cross Appeals, and the proceedings thereon be, and the same are hereby revived, and that the said I. G. C., Esq. be made a party thereto, and stand in the place of the said I. C., Esq., deceased, Whereof all parties concerned are to take Notice.

(Signed) W. Fawkner.

Form of Petition to appoint Master Stephen as the Successor of Master Stanley.

In the Privy Council.

Between (set forth Title).

To the Right Honourable the Lords of the Committee of Council for hearing Appeals from the Plantations.

The humble Petition of I. G. C. of, &c. administrator *de bonis non*, with the Will annexed, of the above named I. C. his late father, deceased,

Sheweth,

That your Lordships by your order, bearing date the 24th of

October, 1801, were pleased to refer it to John Spranger, Esq one of the Masters of the High Court of Chancery, to review a Report made by one of the Masters of the Court of Chancery in Jamaica, touching certain exceptions particularised in the said Order.

That a motion was made unto your Lordships on the 27th of Julo, 1804, praying, in regard the said John Spranger was dead, without having made his Report to your Lordships, that James Stanley, Esq., who had succeeded him, might be appointed in his room to review the said Report of the said Master in Jamaica, in the particulars mentioned in the said Order, and your Lordships by your Order, dated the said 27th of July, 1804, were pleased to appoint the said James Stanley, Esq. accordingly.

That the said James Stanley has lately also departed this life, without having made his Report to your Lordships in respect to the matters referred to him by your Lordships' said Order, and James Stephen, Esq. has been appointed his successor.

Your Petitioner therefore humbly prays your Lordships that it may be referred to the said ames Stephen, in the room of the said John Spranger, deceased, to review the Report of the said Master in Chancery in Jamaica, in the particalars mentioned in your Lordships said Order of the 24th of October, 1801, and to make his Report to your Lordships thereupon.

And your Petitioner will ever pray, &c.

Form of Order of Reference to Master Stephen, in pursuance of the foregoing Petition.

At the Council Chamber, Whitehall, the 24th of June, 1811. By the Right Honourable the Lords of the Committee of Council for hearing Appeals from the Plantations.

Upon Motion this day made to their Lordships (by Counsel) on the Petition of I. G. C., Esq. of, &c. (describing him as in the Petition) referring to an Order made by their Lordships of the 27th of June, 1804, whereby (here the purport of the Order is

stated) and praying, in regard the said James Stanley had departed this life, that James Stephen, Esq. who had been appointed his successor, might be appointed in the room of the said James Stanley, Esq. to review, &c. (as in the Petition.), their Lordships were pleased to appoint the said James Stephen, Esq., in the room of the said James Stanley, Esq., deceased, and to order that it be referred to the said James Stephen, Esq. to review the Report of the Master in Chancery in Jamaica, in the particulars mentioned in their Lordships' Order of the 24th of October, 1801, a Copy whereof is hereunto annexed; And that the said James Stephen, Esq., do make his Report thereupon to this Committee with all convenient speed.

(Signed) Chetwynd.

An Opposition having been threatened to the application, Sir Samuel Romilly attended as Counsel to support the Petition, and had a Fee of 5 Guineas.

It was objected that the Suit had not been revived in Jamaica, but the objection was overruled.

This agrees with the present practice of the House of Lords. Formerly it was thought requisite, when an Appeal abated by the death of a party, to revive the Cause in the Court below, which occasioned much delay; but is now settled that an Appeal may be revived without reviving the original Suit, which cannot be done until the Appeal has been decided.

JUDGMENT

OF

LORD CHANCELLOR LYNDHURST,

IN THE CASE OF *FREEMAN* AGAINST *FAIRLIE.*

In the Court of Chancery, on the 17th of November, 1828.

The following Judgment of Lord Chancellor Lyndhurst, respecting the tenure of landed property in Bengal, which must be highly important to persons who are interested in our East India possessions, not having been, it is believed, any where reported, the Editor avails himself of this opportunity of giving it publicity. Its accuracy may be relied on; and of its merits the Editor will not presume to say more, than that he is persuaded it will considerably add to any value which may be ascribed to the other portion of this little work. It has not been deemed requisite to give a detail of the proceedings in the Cause, because his Lordship's luminous statement fully shews the nature of the question, as well as the ground of the decision.

Lord Chancellor.

This is a case relating to the tenure of land in India, and the

question is of considerable consequence as far as it regards the individual case; of great importance in point of principle; and the more entitled to consideration, as there appears to have been a difference on the subject among the Judges in India. A great body of evidence was adduced before me respecting it, and the question was very elaborately and ably argued by the Counsel on both sides. Having fully examined the evidence, and attentively considered the case, I will now proceed to state the result.

There were twenty-five exceptions to the Master's Report. The first and fifth related to collateral matter, and after proper explanation at the bar, it was agreed that those exceptions should be waived, and that the finding of the Master should not operate prejudicially to the parties, in the future stages of the case. The other exceptions—all but the last, were mere formal objections to prevent conclusions; and it was ultimately agreed that the whole case would turn upon the Judgment which the Court should pronounce upon the last, or twenty-fifth exception. The terms of that exception are these:

"For that the Master, by his Report, hath certified as to the "said lots of land and houses, that the nature or kind of tenure "of the said lots of land and houses was freehold of inheri- "tance: whereas, he ought not to have so certified, but ought "to have reported that the tenure thereof is of the nature of "chattels real, or personal estate; or else a customary estate "by Pottahs—the custom whereof is such, that, on the death "of a person possessed of lands or houses held thereby, the "same, with the right to have a new Pottah thereof granted, "passes to, or vests in, his executors or administrators, to be "administered as personal estate."

The question therefore is, what, generally speaking, is the nature and tenure of Land in India; and, in particular, what is the nature of the tenure of those lots of Land which formerly belonged to Samuel Oldham? The particulars of the Estate of Samuel Oldham, and his Title, may be stated in a few words: It appears that one lot Land, part of the property, was conveyed to him by Deeds of Lease and Release, in the year 1780—the Release to him, his heirs, executors, and administrators, to hold

to him and them, to his and their own use for ever. And there was a covenant on the part of the Grantor, Andrews, that he was possessed of an indefeasible Estate of Inheritance in that property. After the Lease and the Release were executed, and the conveyance so far perfected, application was made by the Grantee, Mr. Oldham, to the Collector's Office, for a Pottah, —the particular nature and form of which Instrument, I shall, by and by, advert to. That Pottah, upon the production of his Title by the deeds, was granted to him as a matter of course.

Another lot of Land, one of the three in question, was in the following year granted to Samuel Oldham, by the same Grantor, Andrews, by the same form of conveyance; and two or three years after, a third lot of Land, which appears to have been, I believe, Komar Land, untenanted Land, formerly belonging to the East India Company, and for which a Pottah was granted to a person named Verelst, was conveyed, by Deeds of Lease and Release, by Petre to Oldham. Petre held that property under a person of the name of Richard Johnson, who conveyed it to him also by Deeds of Lease and Release; and, I think, it appears that Johnson held directly from Verelst. A Pottah was also granted of this Land upon the production of the Conveyance. This was the Title of Oldham.

The question, under these circumstances, and according to the Law as it applies to India, is, whether Samuel Oldham had an Estate of Inheritance, descendible to his Heirs? The first thing to be considered is, what was the state of landed property among the Natives of India, when the English Settlement was originally established in that country? I am speaking of the District of Calcutta. This is certainly involved in some obscurity: but there are two documents, which were referred to in the argument, that throw great light on the subject, and have contributed to remove almost all doubts from my mind with respect to it. These Documents are, in the first place, the regulations distinguished by the name of the permanent regulations. I think it is to be collected from those regulations, that the proprietors of Land in India had the absolute ownership and dominion of the soil; that the soil was not vested generally in the Sovereign, that

the proprietors did not hold at the will of the Sovereign; but held the property as their own, with the power of disposing of it absolutely; and if not disposed of, that it descended to their families. It was liable, indeed, to a tribute to the Government. It appears that the tribute was not fixed, but was increased at the arbitrary will of the Government; and it appears further, that, if the tribute was not paid, Government had the power of taking possession of the Lands for the purpose of obtaining payment. Still, notwithstanding these circumstances and these charges, I think it is impossible to read those Articles, which were prepared obviously with great caution and consideration by persons well-acquainted with the subject, and possessing every means of obtaining the most accurate information on it, and, as far back as the year 93,—without coming to the conclusion that the Zemindars and Talookdars were the owners of the soil, subject only to a tribute, such as I have stated, to Government; and it was the object of those regulations of the year 93, to make that tribute, which had been considered as dependent in its amount on the will of the governing power, fixed and permanent. But I do not rely merely on the regulations of 93. I look, secondly, at another series of Documents,—the Case submitted to the Sudder Dewany Adulet, for their opinion,—and the Documents which accompany that Case, and which were laid before me. Looking at all those Documents and opinions, which were referred to in the course of the argument, and considered as materials on which the parties relied, and which were annexed, I think, to the certified opinion of Sir Edward East; and considering, with the best attention in my power, these papers, they confirm, most strongly, the opinion I should have derived from the permanent regulations: namely, that the proprietors of the soil had a permanent interest in it at the time when the English established themselves in that Settlement.

The next question is, what is the Law, as far as British subjects are concerned, now existing in that Settlement? Undoubtedly, at present, it is the Law of England: I think it clear that those persons who there established themselves, carried with them the English law. It does not appear, at least it has not been stated,

that the English Law was established there, in the first instance, by any Proclamation or Charter: but it is probable that the English carried with them, and acted upon, the Law of England, from the necessity of their situation; because the two systems of law, which at that time existed there—the Mahometan and Hindoo Laws—were so blended with the particular religions of the two descriptions of persons, as to render it almost impossible for that Law to have been adopted by the English Settlers. This, however, is matter rather of speculation, than material to this question: since it appears by all the Charters applicable to the state of the Law, and by all the Acts of Parliament which refer to it, from the Year 1601 down to the present time (and I refer particularly to the Charter of 1726), that the English Law has been considered as the Law of the Settlement. It has been recognised as such by the competent authority; and we are to consider, as far as British Subjects are concerned (for it is confined to British Subjects) that the English Law is not only now the law of Calcutta, but that it was so from the earliest period of that Settlement.

The next consideration, then, is this: if the Native Proprietor possessed a permanent interest in the Soil, and an Englishman succeeded him in the right to the Soil, taking all the interest the Native had, would the English Law apply itself to that interest? In other words, would a permanent interest in Land, vested in an English subject, where the English Law prevails, and a permanent interest in the Soil gives an entire and absolute dominion and ownership, be governed by English Law? Is it not an Estate of Inheritance, descending to the Heirs? It can hardly be denied (though, in part of the argument, it was, to a degree, controverted), that the interest of Oldham in this property was an absolute and permanent interest; and the question made was, whether it passed to one description of representatives, or to another? If it appears on the evidence to be an absolute ownership, what law is be applied to it? Those who contend it goes to the personal Representatives, in a degree apply to it the English Law: because the Law, as to personal Representatives, is an English Law. If, then, we are to apply to it the English Law;

if the absolute ownership of the Soil is possessed by the party; and the English Law is in any shape to be applied to it, the party must take a fee simple, and the property will descend to his heirs.

We now come to consider the evidence. A body of evidence as great as could be collected for the purpose of application to such a subject, has been adduced on the present occasion. There is, first, the evidence of Sir Henry Russell, taken shortly after his return to England, when his recollection was fresh and vigorous with respect to the state of the Law in the country which he had left. He had been for many years a Judge in that country; he had also been for several years the Chief Justice of the Supreme Court of Calcutta. There is the evidence of Sir William Burroughs, who was in that country engaged in the profession of the Law, in different shapes, for a period of more than 20 years; about half of the period as a Barrister, I believe as Advocate General, and the remainder as one of the Judges of the Supreme Court. There is the opinion of Sir Edward East, not given as evidence, but delivered in the shape of a formal Judgment of the Court (and perhaps therefore entitled to more weight than if it were in the shape of evidence), directly applicable to this subject. There is the evidence of Sir Anthony Buller, one of the Judges of the Supreme Court, presented in the same way. There is the evidence of the remaining Judge, Sir Francis McNaughten, which does not appear to me so much to differ with respect to the material facts of the case, as to the conclusions and the inferences which he draws from them. There is the evidence of Mr. Robert Smith, who for several years held the office of Advocate General at Calcutta. There is the evidence of a gentleman who filled also for several years the office of Advocate General, and was in a more extensive practice, perhaps, than any man that ever went out to that country as a practising Barrister, I mean Mr. Robert Fergusson. There is the evidence of Sir Edward Colebrooke; and a great variety of other individuals whom it is not necessary particularly to name. Now as to the result of this body of evidence, what are the facts established by it? I think it is beyond all doubt, that property of this

description has, from the period at least of the year 1774 (the date of the Charter of Justice), been constantly conveyed by deeds of lease and release, in the form in which Oldham took the property in question. It is proved also, and by one of the officers of the Court, that of land of this description fines are levied. It is proved by all these persons, that it has been the constant course of the Supreme Court of Calcutta, when Ejectments are brought by the heir at law, on establishing the possession and title of the ancestor, and proving the claimant is the heir at law, in such ejectments the heir has always recovered. It was asked in the course of the argument whether any case could be named? It is stated by these witnesses as a circumstance of constant occurrence, and therefore it might not be very easy immediately to name a particular case, because being a thing of constant occurrence, there would be no motive for recollecting one; but it happens that in the Judgment of Sir Edward East, he does incidentally name a Case, that of Doe, on the demise of Gasper, against Doss, in which the heir at law (an American) recovered property, in an Action of Ejectment, under the circumstances to which I have referred.

There are some other circumstances to which these witnesses speak, tending to establish the fact, that from the year 1774, down to the present time, this property has always in India been treated as real property, descendible to the heir at law; they not only state the facts to which I have referred, and other facts which might also be mentioned, but they state it as the result of their experience, of their knowledge of the law of the country, and their inquiry into it; as the result of their long practice, and of their observation of the decisions of the Courts in which they themselves have been partakers and actors, that property of this description had always been considered as real property, descendible to the heir. But further than this, if we refer to the Charter of Justice in the year 1774, granted by the Crown, we find in the language of it a distinction expressly drawn, and in terms, between personal and real property. It may, and I think has been said, by one of the learned Judges to whom I have referred, or it has been glanced at, that that may be satisfied, by considering

this property as a chattel real; but looking further into the Charter, it will be found that this explanation will not avail, because the Courts have Jurisdiction, expressly and in terms, in all actions, and pleas, real, personal, and mixed: a recognition, therefore, by the Crown (the highest authority) that real property exists in that country, according to the meaning of that term as used in the law of England.

But the case does not rest here. We may refer to express decisions on the subject; to express decisions of the tribunal most competent, from its peculiar situation, to form a correct judgment on the subject; I mean the Supreme Court of Calcutta itself. As far back as the year 1785, this case came directly for decision before the Court.—The question turned upon the execution of a will of a person named William Wiffen; that will was attested only by two witnesses, and the question was, whether it passed a real estate? The Court decided that it did not; and in deciding that question, they, in the first instance, decided that the property was real property, according to the Law of England, descendible to the heir: And they also decided, for that was necessary in the view which two of the Judges of the Court took, that the Statute of Frauds extended to India. The third Judge did not think it necessary. Sir William Jones, I presume, did not think it requisite to decide this last point, because of the opinion which he had formed with respect to the construction of the Will itself; but as to the general question with regard to the nature of the property, he entirely agreed with the other Judges. The Question came again before the same Court in the case of Josephs and Ronold; it was then very elaborately argued, on account of the difference of opinion entertained on the Bench. We have before us the Judgment of the Chief Justice, and also the Judgment of Sir Anthony Buller, and we have the Judgment in print, under his own authority, of the third Judge. That Judgment confirmed the previous decision, not by the unanimous voice of the Court, but by the voice of the Chief Justice and of Sir Anthony Buller; the other Judge, Sir Francis McNaughten, dissented. I have read through the reasons assigned for his Judgment; they are very unsatisfactory to my

mind, and I must say I concur in the view taken by the majority of the Court.

This then is the case, as it presents itself in one view of it. But it is argued that these are Estates held by Pottah; that the Pottah is an instrument which cannot convey an Estate of Inheritance; that even if it could convey such an Estate, the East India Company have only a transitory interest in the Settlement; and that they could not convey a greater interest than they themselves hold. With respect to the last point, I will dispose of it first. The East India Company is a Corporation; they are capable of taking land in fee; they are capable of disposing of Lands so taken in fee; and if an Act of Parliament should interpose to put an end to their corporate existence, the title of the Holder of any property which the Company may have taken in fee, and which, while they were a Corporation, they disposed of in fee, would not, by the extinction of the Corporation, be at all, in my judgment, affected. But this is a mere question of speculation, because in an Act which authorizes Parliament, upon a three years' notice, at a given period, to put an end to the exclusive Trade of the East India Company, and to their Territorial dominion in India, in that very act there is a proviso that it shall not affect their corporate character that character will continue, and they may, as before, carry on trade, though not exclusively. It appears to me, therefore, that this argument is entirely destitute of foundation.

Then as to the Pottah, it may be material to read the language of it; one of the Instruments in question is as follows. "To the "benevolent Sir Beebee Anna Haigh, Attorney to Mr. Samuel "Oldham, this Pottah of land is granted. I grant you this Pottah "for one bigaugh, 18 cottahs, and 7 chittahs of land, formerly "belonging to Mr. Samuel Oldham, in my Talook Mouza Dhee, "Calcutta, for you to dwell therein, and you will pay the rent "thereof, the annual sum of Sicca 5 Rupees, 12 Annas, and 5 "Gundas in Coin, received in payment of rent, and dwelling there-"in, free from interruption, hold possession of it, on this occasion. "I grant you this Pottah"—and then there is added the date. Now let us see what the evidence is as applied to these instruments.

It appears that upon the transfer of possession, or rather of title, upon a conveyance, for instance, by a former owner, by deeds of lease and release, to a new proprietor. He, carrying his title deeds to the Collector, obtains a new Pottah, as matter of right; the Collector cannot refuse it; the proprietor can insist upon it. In the same manner the heir at law, going before the Collector, and satisfying him that he is the heir, is entitled to the Pottah. There is a rent, as it is said, according to the translation, payable on these pottahs. I think it is quite clear that that rent is a tribute or jumma; and Sir Edward East in his judgment refers to a document, by which it is put, I think, beyond all doubt, that it is the jumma which was fixed by the regulations of the year 93. If part of the Estate should be alienated, then this rent, or jumma, or tribute, is apportioned between the two proprietors. This Pottah, it may be remarked, is issued by the Collector; he is the Officer of the Government, and it appears upon the very face of it, that it was nothing more than a fiscal regulation, introduced for the purpose of collecting the tribute to which the Land is subject. Sir Henry Russell is distinctly examined with regard to it; he says that, in establishing a Title to Land in a Court of Justice, the Pottah is not necessary; it frequently happens that after the Title Deeds are produced and proved, the Pottah also is produced, but he has known instances where the Pottah has not been produced, and the parties have recovered; and he does not consider, and it never was considered while he was a Judge, that it was necessary to produce the Pottah. The Pottah therefore forms no part of the Title; it is the conveyance that gives parties a right to claim the Pottah; and by having the latter, the amount of the sum payable to the Government is ascertained, and future doubt prevented.

But it was said, in this particular case, as to one of the portions of land, that it was Komar land, granted by the East India Company, and that there was no Deed of Conveyance,—the Pottah being the only Conveyance. Sir Edward East in his Judgment says he knows it has been the practice of the Company, in small grants of land, to direct the Collector to issue the Pottah, without making a Conveyance. In this particular instance,

whatever the East India Company may have done, the Grantee, or rather the person who took from the Grantee (for there is no evidence of any Deed from Verelst, to whom the Pottah was in the first instance granted)—Johnson, who took from Verelst, conveyed by Deeds of Lease and Release to Petre, and Petre conveyed ultimately (for there was first a Deed Poll) by Lease and Release to Oldham, in the same form as the Deeds of Lease and Release to which I have before adverted. What then does the case come to, supposing no Deed has been executed by the East India Company, who were the proprietors of the land in their corporal capacity, and not as Rulers of the Country? Does it come to any thing except a possible defect in the Title, namely, that a proper Deed was not executed by the first Grantor? But that does not at all affect the question we are now considering. That the East India Company, when they convey these small portions of Land in the way I have stated, without executing Deeds of Lease and Release, or any conveyance beside authorizing the Collector to issue the Pottah, consider they are conveying the absolute property in the soil, is quite clear from the evidence. Sir Edward Colebrooke speaks to this effect. And then is the circumstance of a man's taking Land of this description in this way, from a confidence in the East India Company, for the purpose of building, in which large sums of money are laid out, which never would be expended but upon the assumption that the party had a permanent interest in the soil—is this, I say, to prejudice him? Nay more, it has in several instances occurred that the East India Company, after making grants of this description, have been desirous of having the Land again, for raising Public Works, and they have purchased it back from those who were considered the Owners of the Soil, at a very large price. It appears to me, therefore, that nothing turns upon the distinction attempted to be taken between this third portion of land, and the other portions.

I omitted to state (what has been called to my recollection by seeing a Gentleman now in Court) that the question respecting the nature of this property has been decided here in England, in a case of Gardener against Fell, which was cited in argument at

the Bar, and which was decided in the year 1785. In that case the very point was raised in this Court, with regard to an Estate in Calcutta, called the Barrishall Estate. The Owner of that Estate devised it by Will, attested only by two Witnesses; the Case came on before Sir William Grant, when Master of the Rolls; it was referred to the Master to enquire into the Law of India in that respect; he had evidence before him upon it, and he reported that the Estate was fee simple of inheritance, and would not pass, unless the Will was attested by three witnesses. In another case of Comyns against Fletcher, the parties who were interested in disputing the fact, acceded to it; and supposing the property had escheated, presented a memorial to the Crown, praying that it might be conveyed to them, subject to the trusts of the Will. It is true a case was cited at the Bar, of a contrary effect—I mean the case of Short and Cove. That was also referred to the Master, who came to an opposite conclusion, for he found that it was personal estate; and that Report was confirmed. But looking at the Order, it was confirmed, as I conceive, by consent. And that case was decided on the very testimony of one of the witnesses in this cause—Sir William Dunkin, a person certainly, from his situation,* competent to have formed a correct Judgment on the subject; yet in looking at his evidence as reported by the Master, it not only is in direct opposition to the whole body of evidence laid before me in this case, but is in direct opposition to that about which there can be no mistake, the decisions of the Courts in India; and therefore I believe the Master in the present case placed very little reliance on the testimony of Sir William Dunkin.

The other point that has been insisted upon, and on which a great part of the Argument turned, was, that this property is assets in the hands of Executors or Administrators, for the payment of the Testator's debts by simple contract. I confess I have never myself felt the weight of that Argument. Suppose an Act of Parliament were to pass, similar to that which passed during the last Session, with reference to India—suppose a similar Act were to pass with respect to land in England, it would

* Sir William Dunkin had been a Judge in Bengal.

render real property assets for the purpose of paying the simple contract debts of the Testator or Intestate, but it would not alter the tenure of the Land—the Land would still be inheritable—it still would descend to the heir at law. I do not therefore perceive the force of the observation. If it were introduced by competent authority, it would be a charge, or a liability engrafted or imposed on the real Estate, to which otherwise it would not be subject. In what way it was introduced, does not, I think, very distinctly appear. I must own I am not (and I agree with the Master in this respect) perfectly satisfied with the argument of the Chief Justice, Sir Edward East, in which he refers this wholly to the Charter. I think it not improbable that it crept in at a very early period, when the Law was not much attended to in that country; it got established by use; it was continued as being found convenient; and perhaps it has no legal origin; it now has, however, the sanction and authority of an Act of Parliament. If it had a legal origin, it appears to me that it would not affect the decision of this question; if it had not a legal origin, still less would it affect it. The only way in which it can be used at all, is as an argument that it being an incident to personal property, to be applicable to the payment of debts, this should be considered personal property; but as an argument standing alone, I think it weighs very little, in opposition to the weight of argument and evidence on the other side; and therefore, considering every part of this case, and judging after the best attention I have been able to give it, I agree entirely with the Master in thinking this is to be considered as freehold of inheritance, as real property, according to the Law of England; and not as real chattel, or as personal chattel; nor is it to be considered as Estate held by Pottah, subject to those Regulations mentioned in the Exception; but, conformably with the finding of the Master, it is freehold of Inheritance, according to the acceptation of those terms by the Law of England.—The Report must therefore be confirmed.

ADDENDUM,

Which should have followed p. 36.

Form of Master Stephen's Report.

18 August, 1814.

Between (Titles of Appeal and Cross Appeal).

On Appeals from the Court of Chancery in Jamaica.

To the Right Honourable the Lords of the Committee of Council for hearing Appeals from the plantations.

In pursuance of an Order of your Lordships, made in these Appeals, and bearing date the 24th day of June, 1811, whereby (the purport of the Order is here stated) I have been attended by the Solicitors for the Appellants and Respondents, and have proceeded, in their presence, to review (here follow the directions of the Order) and to examine various statements of Facts, Accounts, &c. (stating the particulars) and after full consideration of the said evidence, and of what has been alleged, and mutually admitted before me, by the Solicitors for the said parties, I find, and humbly report, that (here the result is set forth, concluding) —All which I humbly certify and submit to your Lordships.

(Signed) Jas. Stephen.

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